

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 49 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE M.C.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

KHATKI RAMJAN ISABHAI

Versus

STATE OF GUJARAT

Appearance:

MR MIG MANSURI for Appellant
MR AJ DESAI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 11/09/2003

ORAL JUDGEMENT

1. The appellant Ramjan Isabhai was the accused no.1 in Sessions Case No.69 of 1994 before the learned Sessions Judge, Surendranagar who, by judgment and order dated 29th November, 1995, convicted the appellant of the offence under Section 302 of the I.P.C. and Section 135 of the Bombay Police Act and sentenced the appellant to suffer imprisonment for life. The accused nos.2 and 3 who were also charged alongwith the appellant for the offence under Section 302 read with Section 114 of the I.P.C. were acquitted. The State has not filed any appeal against the acquittal of the said accused.

2. The charge against the appellant and the other accused was that the appellant caught hold of the deceased Koli Raju Dana and while he was trying to escape, the accused nos.2 and 3 blocked his way and the appellant inflicted two knife blows on the deceased, one on the chest and the other on the back and Rajubhai succumbed to the injuries. The incident was alleged to have occurred on the road near the house of Koli Gordhan Amarshi at Kolipara at Dhrangadhra.

3. The prosecution case was as follows:

3.1 In Kolipara area at Dhrangadhra, people of Koli and Khatki community lived as neighbours. There was a wedding of daughter and son at the house of Koli Shamji Vira. The boys and girls were playing to the beat of drums at night. At about 10.15 p.m., Tabudo (accused no.2), the son of Khatki Nimi, came to play the drums. However, Raju Dana refused to allow him to play and there was an altercation between him and the accused no.2. The accused no.2 went back to Khatkivas and Raju went towards the road. Lalji Bachubhai (p.w.2), Mahesh Khimji (p.w.3) and Deena Vaju were sitting there. They also got up and were going towards the 'paan galla' on the road. At that time, near the house of Gordhan Amarshi, the appellant and the accused nos.2 and 3 and one Sikandar were giving abuses to Raju Dana. Lalji Bachubhai, Mahesh Khimji and Deena Vaju went there and told them not to quarrel and give abuses. However, the accused no.2 caught hold of Raju Dhanji and when Raju tried to get away, the accused nos.2 and 3 and Sikandar blocked his way and the appellant inflicted two knife blows on Raju, one on the chest and one on the back. The accused ran away. Raju was bleeding profusely. Just then, Maheboob Haasam (p.w.8) happened to pass by on his scooter. He was stopped and Mahesh Khimji seated Raju on the scooter and he and Maheboob Haasam took him to hospital. Lalji

Bachubhai and Deena Vaju followed them on a bicycle. On arrival at the hospital, Raju was declared dead. The telephonic message was sent to the police station and the entry was made in the station diary. The message was sent by Dr. Vadodaria and it was stated that Raju Dhanji had been injured in Kolipara and he was brought to hospital at 11.35 p.m. where he was declared dead.

3.2 Shivsinh Gohil (p.w.12) was on duty as Police Inspector in the police station. On receiving the message from the hospital, he went to the hospital. He recorded the complaint of Lalji Bachu (p.w.2). He sent the complaint to the police station for registering the offence and Halubha Mulubha (p.w.11), who was on duty as P.S.O. at the police station, registered the offence. Shivsinh Gohil held inquest at midnight. He also recorded the statements of Mahesh Koli and Deena Vaju who were in the hospital. He went to the place of the incident and as there was darkness, he instructed Head constable Mahendrasinh to keep vigil since the incident was between Hindus and Muslims. The panchnama of the scene of offence was prepared in the early morning at 6.30. All the three accused and Sikandar were arrested at 7.15. According to the prosecution, the appellant produced the knife which was attached and so was the blood-stained shirt which he was wearing. Sikandar was a juvenile and he was chargesheeted before the Juvenile Court. The chargesheet against the remaining three accused was filed and the case was committed to the Sessions Court at Surendranagar.

4. In the complaint, Laljibhai had given the names of accused no.1 and 2 and described accused nos.3 and 4 as the nephews of Rahim Khatki but he said that he knew them by face. It appears that in the course of investigation, their names were ascertained and on 9th March, 1994, the Investigating Officer sent a report to the learned Magistrate submitting that their names may be added in the F.I.R.

5. The post-mortem was carried out by Pragyaben Kothari (p.w.1) and her evidence shows that there were two incised wounds, one on the chest below left nipple and the other on the scapula. There was a fracture of 5th and 6th rib on the left side. Pericardium was also cut. The death was due to internal haemorrhage because of injury to the heart. She also said that the death could have been caused by the muddamal knife which was shown to her and that it was sufficient to cause death in the ordinary course of nature. It is not disputed by the defense that the death was homicidal. The question is

whether the injury was caused by the appellant, as alleged by the prosecution.

6. The complainant Lalji Bachubhai was examined at Exh.18. According to him, he was working in a quarry and knew deceased Raju who was his friend. On the day of the incident, there was a marriage of the daughter and son of Shamjibhai Virabhai. He was at his house and songs were being sung. It was about 11 o'clock at night. Raju was playing the drum. At that time, the accused nos.1 and 2 had a quarrel with Raju about singing. After the quarrel was over, Raju went to the 'galla' on the road for having a paan. Raju was followed by Sikandar and the three accused. Laljibhai and Mahesh were sitting on the road. There was a quarrel between Raju and Sikandar near the house of Gordhan Amarshi. Then he said that all the four accused had a quarrel with Raju. At this stage, he said that he did not know why they were quarreling and when it became apparent that he was not inclined to support the prosecution case, he was declared hostile and cross-examined by the learned PP. He said in cross-examination that he did not know who had given a knife blow to Raju. Mahesh Khima and Maheboob had taken Raju to the hospital. He also admitted that his complaint was recorded in the hospital and he has put his thumb mark on the complaint. He said that the complaint had been read over and thereafter he had put his thumb mark. However, when the contents of the F.I.R. were specifically put to him, he denied that he had made such a statement. In cross-examination on behalf of the accused, he said that he and Mahesh were sitting on the gutter near the road. He said that the place of incident was about 250 to 300 feet away from where they were sitting. It was elicited in his cross-examination that Mahesh was the son of Khima Bhudar, who was the maternal uncle of deceased Raju. He also said that he had seen a knife lying in the gutter after the incident.

7. Mahesh Khimji (p.w.3) was an eye-witness according to the prosecution, and the prosecution case mainly rested on his evidence since Laljibhai turned hostile. According to Mahesh, people were playing to the beat of drums in Kolivas and he was sitting there. There was a marriage of one daughter and son but he did not know whose son and daughter they were. He said that there was a quarrel near the house of Gordhan. It was about 11 o'clock at night. He was sitting alone at a distance of about 50 feet. He said that he did not know how the quarrel started but then he said that Raju had told Khatki to go back to his area. There were four persons including the appellant. They went away and then

the three accused and Sikandar came back. At that time, Raju was sitting on the 'paal' near the Haripar road. After the four persons came back, Raju was murdered. The four persons had a quarrel with Raju and then they inflicted knife blows and Raju was killed. The quarrel was about playing drums. Ramjan inflicted knife blows on the chest and the back and the other three persons had held down Raju. He and Maheboob Sandhi took Raju to the hospital. He did not know who had come to the hospital thereafter. The doctor had declared Raju as dead. He stayed in the hospital till 6 o'clock in the morning. He was questioned by the police in the hospital. In cross-examination, he said that his father was the maternal uncle of deceased Raju. Raju was sitting on the edge of the gutter and Raju was killed at a distance of about 10 feet from the gutter. He said that he had not talked to any one about the incident. He said that he had not given the names of the accused to Laljibhai Bachubhai. At the time of the incident, he was sitting on the edge of the gutter. He said that he was sitting alone.

8. The third material witness examined by the prosecution was Maheboob Haasam (p.w.8). He also lived in Kolipara. He had gone on his scooter to the 'paan galla'. He saw a crowd there and heard cries near the house of Madhubhai. The place was about 60 to 65 feet from the road. When he reached there, he saw Raju lying unconscious and bleeding. He asked Mahesh who he was and he said that he was his brother. Then they took him on the scooter to the hospital. In cross-examination, he said that he had asked Mahesh who had caused injury to Raju but Mahesh kept saying "take him to hospital".

9. The prosecution also relied on the report of the F.S.L. which shows that the knife allegedly produced by the appellant and the shirt which the appellant was wearing at the time of arrest were found to have been stained with the blood of the same group as that found on the clothes of the deceased. However, Chandubhai Nagarbai (p.w.6) who, according to the prosecution, was the panch witness of the arrest panchnama, did not support the prosecution.

10. As stated earlier, it is not disputed that the death of Rajubhai was homicidal and the only question was whether it was the appellant who had inflicted the fatal injury. Laljibhai, the complainant did not support the prosecution and turned hostile. The prosecution, therefore, had to fall back on the evidence of Mahesh Khimji (p.w.3) who claimed to have seen the appellant

giving the fatal blow.

11. The learned counsel for the appellant submitted that Mahesh was, admittedly, a relative of the deceased and his evidence requires close scrutiny, that he did not disclose the names of the assailants to anyone, that the evidence shows that there was darkness and there was no source of light mentioned in the panchnama or the map and in the circumstances, Mahesh could not have identified the assailants. He also submitted that the F.I.R. was not recorded on the time on which it purports to have been recorded but was ante-timed. He submitted that the evidence of recovery of the knife from the appellant cannot be believed, since according to Laljibhai, the knife was lying in the gutter.

12. The learned APP Shri A.J. Desai, on the other hand, submitted that the F.I.R. was lodged immediately. The very fact that the names of accused nos.3 and 4 were not mentioned in the F.I.R. shows that the F.I.R. was not ante-timed. He submitted that there is no reason to disbelieve the evidence of eye-witness Mahesh Khimji.

13. The whole evidence was read before us and we have carefully considered the same. We are not convinced that the F.I.R. was recorded in the morning after the names of all the accused were disclosed and it was ante-timed. However, we find substance in the other contentions raised on behalf of the appellant. According to Mahesh, he was sitting on the edge of the gutter. The map shows that it was at a distance of 14.2 metre, which comes to about 45 feet from the place of the incident. No source of light is mentioned in the panchnama. Even in the map, there is no street-light pole. Even the Investigating Officer had also stated that there was darkness at the place of the incident. Mahesh did not disclose the name of the assailants to Maheboob. His failure to do so, in the circumstances of the case, becomes significant when it is considered in light of the fact that Mahesh was at a distance of 45 feet from the incident and there was darkness. This raises serious doubt as to whether Mahesh really did see the appellant giving the fatal blow. The benefit of the doubt must, therefore, go to the appellant.

14. As for the recovery of the knife from the appellant, the learned counsel for the appellant rightly submitted that, according to Laljibhai, the knife was lying in a gutter and it is not possible to believe that the appellant no.1 would carry the knife and give it to the police. In the absence of any reliable oral evidence

to identify the appellant as the assailant, it will not be safe to rely only on the evidence of recovery of blood-stained shirt of the appellant as connecting him with the offence. The result of the above discussion is that there is serious doubt as to whether Mahesh could have seen the appellant giving the fatal blow and the benefit of the said doubt must go to him. The appeal is, therefore, allowed. The judgment and order rendered by Sessions Judge, Surendranagar in Sessions Case No.69 of 1994 on 29th November, 1995, impugned herein, is hereby quashed and set aside. The appellant Khatki Ramjan Isabhai is acquitted of the offence under Section 302 of the I.P.C. and under Section 135 of the Bombay Police Act. He is ordered to be set at liberty immediately, if he is not required in any other case. It is stated at the bar that at present, the appellant - convict is in District Jail, Rajkot. The writ may, therefore, be sent to the District Jail at Rajkot.

(N.G. Nandi, J.)

(M.C. Patel, J.)

hki